IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

NO. 68

LEON SPENCER,

Appellant

v.

THE STATE OF TEXAS,

Appellee

APPEAL FROM
THE COURT OF CRIMINAL APPEALS
OF TEXAS

BRIEF FOR APPELLEE

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TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Opinion Below

The opinion of the Court of Criminal Appeals of Texas is reported in 389 S.W. 2d 304 (Appendix "A").

Jurisdiction

The question of jurisdiction was postponed to the hearing of the case on the merits.

This is an appeal from the Texas Court of Criminal

Appeals where appellant's judgment of conviction for the offense of murder with malice was affirmed.

Appellant seeks the jurisdiction of this Court by appeal under 28 U.S.C. 1257, Secs. 2 and 3.

The State of Texas agrees that the statements made by appellant Spencer concerning the history and steps on appeal are correct, but does not agree that this honorable Court should take jurisdiction.

Appellant cites *Rice v. Sioux City Memorial Park Cemetery,* 349 U.S. 70, because he assumed the procedure of reading the indictment to the jury had been changed by the passage of Senate Bill 107, 59th Legislature, now Art. 37.07, Code of Criminal Procedure of Texas (1965).* The State does not and cannot rely upon a repealed statute should this Court treat the appeal as an application for certiorari. The procedure was not changed in capital cases. The Court of Criminal Appeals of Texas so held in *Rojas v. State,* 404 S.W. 2d 30 (1966). The procedure before this case was tried and at the present time allows the reading of the entire indictment to the jury at the beginning of the trial. There is no alternate procedure in a capital case in Texas allowing assessment of penalty in a separate hearing after a finding of guilt on the primary offense.

Does this Court have to hear every case on the merits in which a defendent claims a statute of a state violates due process? If so, every time a state statute is enforced, all a defendant would have to do would be object that it violates the Fourteenth Amendment of the Constitution of the United States to confer jurisdiction on this Court.

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*Appendix "B".

Spencer suggests that if this Court does not consider this a proper case for appeal it be treated as an application for certiorari.

No Prejudice to Appellant

In *Goins v. United States,* 306 U.S. 622, certiorari was granted, but this Court found that the failure to give an instruction which led to the granting of the writ did not prejudice the petitioner.

The procedure in Texas did not prejudice Spencer. There was no defense offered to the murder. Eyewitnesses made the case. The opinion of the Court of Criminal Appeals (Appendix "A") recites some of the evidence which shows that he was separated from the deceased after they had lived together some four or five years. Spencer went to the home of the deceased, who was lying on a bed playing with her daughter's twenty-month old baby; he almost immediately fired a shot that hit her in the face, and she fell off of the bed. Deceased's daughter jumped over the bed and lay down on top of deceased to protect her. Spencer walked around the bed, pulled the daughter off and fired four more shots into the face and head of the deceased. Evidence was introduced that appellant had been drinking that day. It would be hard to conceive of a jury under the facts of this case not finding Spencer guilty.

Counsel for appellant apparently suggest this procedure; that the jury find him guilty, hear evidence of the prior conviction, then assess the punishment. Under Art. 64, Penal Code of Texas (Appendix "C"), the penalty is death or for life in the pentitentiary. The jury assesses the penalty in capital cases in Texas. Before assessing the punishment, the indictment, un-

der appellant's theory, would be read, showing the prior conviction for murder. The jury would know this before assessing the penalty. It is hardly conceivable that a different result would follow.

Since appellant was not prejudiced by the procedure used, this Court should hold there is no substantial federal question.

Conflict of Circuit Court Opinions

Although not briefed by appellant, this Court has sometimes granted certiorari where conflicting decisions have been reached by different circuits of the Courts of Appeals. This is apparently the general rule, but according to Stern in 66 Harvard Law Review, *Denial of Certiorari Despite a Conflict,* this Court has denied certiorari in cases involving federal prosecutions on the same facts where two Circuit Court opinions were in conflict.

In *Ruhlin v. New York Life Insurance,* 304 U.S. 202, 206, is found the following:

> "As to questions controlled by state law, however, conflict among circuits is not of itself a reason for granting certiorari."

There is an apparent conflict between the 4th Circuit in *Lane v. Warden of Maryland Penitentiary,* 320 F. 2d 179 (1963), and the 5th Circuit in *Breen v. Beto,* 341 F. 2d 96 (1965).

The State submits that this should be controlled by state law and this Court should not take jurisdiction.

Question Presented

Does the knowledge received by a jury of a prior

conviction through voir dire examination and the reading of the indictment constitute such a prejudice that would violate due process and prevent a fair trial?

Argument

The evidence heretofore set out and in the Opinion of the Court of Criminal Appeals (Appendix "A") shows without a doubt appellant to be guilty of the offense of murder. As mentioned in appellant's brief, the trial court instructed the jury not to consider the prior conviction of appellant on the issue of guilt of the murder of Luvenia Irvine. Can it be said the jury ignored the instruction?

A witness for the state, Mary Wilson, testified that about three years before Spencer threatened the deceased (Cert. R. 106); that ". . . they were arguing in the room and he told her that if she don't shut up he would kill her like he did his first wife" (Cert. R. 107). The trial court sustained an objection to the latter statement and instructed the jury not to consider it. If the jury followed that instruction, the statement was not considered. This was admissible testimony in Texas under Art. 1257a, Penal Code (Appendix "D"), which provides in substance that the State or defendant shall be permitted to offer testimony to all relevant facts and circumstances surrounding the killing and the previous relationship existing between the accused and deceased. The Court of Criminal Appeals held under this Article in *Baker v. State,* 368 S.W. 2d 627, that the testimony of a son that the defendant threatened and struck his wife some six years before was admissible.

The State submits that admissible testimony was

available to show from Spencer's own statement that he killed his former wife, and the jury would not be unduly influenced by learning of a conviction for the act.

Comparative Procedure

In the prosecution of a federal case, the prosecutor may allege any number of crimes in one indictment. Under this established practice, one case shows an information charging 225 separate and distinct crimes of transporting forged and false securities was upheld in *United States v. Taylor* (2 Cir. 1953), 207 Fed. 2d 437. During the last term of this Court, in *Ginzburg v. United States,* 86 S. Ct. 942, the conviction was affirmed which contained 28 counts of violating the Federal obscenity statute. The practice is so well settled in the federal courts it was not challenged.

In *Mishkin v. State of New York,* 86 S. Ct. 958 (1966), the information charged 159 counts of violation of the New York obscenity laws; there were 141 convictions for separate and distinct crimes.

It is submitted that this Court adopted the rule that permits a more prejudicial practice than that used in Texas. In *Brandenburg v. Steele* (8 Cir. 1949), 177 F. 2d 279, the defendant was indicted for 11 separate offenses of unlawful sale of narcotic drugs. The Circuit Court discussed Rules 8(a) and 13 which permit the joinder of two or more offenses. Rule 13 authorizes a consolidation of two or more indictments in a joint trial, it stated:

> ". . . In view of the statute and the Rules prescribed by the Supreme Court above referred to, which authorized the procedure which resulted in the appellant's conviction, it is obvious that he is

entirely mistaken in his assertion about denial of due process. He was dealt with in accordance with long established and conventional federal procedure."

If this Court adopts the reasoning of *Lane v. Warden,* the practice of charging separate offenses in one indictment would be abolished. The jury hearing on indictment and proof of the sale of heroin on 8 separate times and places, or 28 separate counts charging separate and distinct obscenity crimes would show the defendant to be more of a criminal generally than the allegation on proof of a prior conviction.

The Texas practice allows several counts covering the same transaction, but only one conviction may be had. Separate and distinct offenses cannot be alleged in one indictment. Art. 21.24, Code of Criminal Procedure (Appendix "E"). The practice of alleging and reading the prior conviction, it is submitted, is not as prejudicial as a federal judge looking at a pre-sentence report when the defendant has no absolute right to see it. Rule 32(c)(2). See Comment by Mr. Justice Douglas 86 S. Ct., 208, 210. In the Texas practice, the historical fact of prior conviction is alleged; the defendant knows what the jury considers in assessing punishment. If he was not the person convicted, he can file a motion to suppress and have it excluded. Where the penalty is absolutely fixed by law, the Court of Criminal Appeals prior to the adoption of S.B. 107 permitted defendants to stipulate the prior conviction or convictions and have the jury pass upon guilt. See Opinion of the Court of Criminal Appeals in this case (Appendix "A").

In *Michelson v. United States,* 335 U.S. 469, the Court held that the State may not show defendant's

prior trouble with the law and specific criminal acts or ill-name among his neighbors.

In a footnote to the *Michelson* case, this Court noted the exception "as when a prior crime is an element of the later offense, for example, at a trial for being an habitual criminal."

In *Wolfe v. Nash* (8 Cir. 1963), 312 Fed. 2d 393, cert. den. 84 S. Ct. 705 (1964), the Court, in dealing with the state habitual criminal statute regarded as a purely local legal problem and no national concern whatsoever, stated that ". . . the due process clause of the Fourteenth Amendment does not enable us to review errors of state law."

In *U. S. v. Yazell,* 86 S. Ct. 500 (1966), a plea of coverture was entered by Mrs. Yazell because at the time the contract was made with the Small Business Administration, she, a married woman in Texas, could not bind her separate property unless she had obtained a court decree removing her disability to contract. Mr. Justice Fortas, speaking for the Court, stated that the case presented an aspect of the continuing problem of the interaction of the federal and state laws in our complex federal system. The Court held that, under the circumstances of the case, the state rule governed. In the present case, the state submits that the state rule should govern.

The State of Texas submits that in the Texas practice there are rules beneficial to the defendant that the federal and other courts do not have; that there are rules in the federal courts and other state courts that are at times more beneficial to the defendant than the Texas courts have; the fact that some jurisdictions do not have a practice does not make unconstitutional

a practice used in another state. Some states have the death penalty; some states do not. Some jurisdictions permit a comment on the weight of the evidence; some do not. Some jurisdictions give shotgun charges to the jury; some do not permit the explosive charge. The appellee submits that these are matters for the state; that no constitutional provision has been violated.

Conclusion

The appellee, the State of Texas, submits that there is no substantial federal question; that this Court should not entertain the appeal merely because appellant contended that the enforcement of our second offender capital statute violated due process; that this case should not be handled under the rules of certiorari merely because there is a conflict in decisions of the Circuit Courts involving state law. There is no prejudice to Spencer; the evidence was overwhelming as to his guilt; no defense was offered. The jury would have known of his prior convictions in advance of assessing the penalty, and the fact that the indictment was read containing the prior conviction paragraph could not have prejudiced the jury. The jury heard the evidence (which was later withdrawn) that he would kill the deceased like he killed his first wife; this was admissible. The State submits that fairness is a relative matter; that the practice in the Texas courts is less prejudicial to an accused than in the federal courts and other jurisdictions where 200 counts or more may be alleged in a single indictment for separate and distinct offenses; that this Court has recognized the rule that in habitual criminal cases where the prior conviction was an element of the offense these could be properly brought before the jury.

It is respectfully submitted, for the reasons stated above, that the judgment of the Court of Criminal Appeals of Texas should be affirmed.

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A copy of the above brief has been furnished to opposing counsel, Michael D. Matheny and Joe B. Goodwin, 635 San Jacinto Building, Beaumont, Texas.

Date:----------

APPENDIX "A"

LEON SPENCER, *Appellant*
No. 37,921 vs. APPEAL FROM
THE STATE OF TEXAS, JEFFERSON COUNTY
Appellee

OPINION

The offense is murder; the punishment, enhanced under Art. 64, V.A.P.C., death.

Art. 64, V.A.P.C., provides that a person convicted a second time of any offense to which the penalty of death is affixed as an alternate punishment shall not receive on such second conviction a less punishment than imprisonment for life in the penitentiary.

The testimony reflects that appellant and deceased had lived together for about four or five years and had separated in October or November, 1963. On January 7, 1964, around 7:30 P.M., deceased was at her home in the City of Beaumont with her two sons, aged fourteen and eight, and her daughter, about eighteen years of age, and her daughter's twenty month old baby. As deceased was lying on the bed playing with the baby the appellant walked into the house, entered the room where deceased was and almost immediately fired one shot with a pistol. The shot hit deceased in the face, and she fell off the bed. Deceased's daughter, who was in the room at the time this occurred jumped over the bed and lay down on top of deceased to protect her. At that time appellant walked around the bed, pulled deceased's daughter up and fired four more shots into

deceased's face and head. Appellant was attacked at that time by deceased's fourteen year old son who had seen part of this occurrence. Appellant knocked the knife out of the son's hand and walked out of the front door of the house where he stopped and appeared to be either loading or unloading the pistol. The deceased's daughter ran out of the house after him and when she fell down, appellant looked back at her and told her her mother was no good and then he grinned.

After leaving the house where the shooting occurred, appellant walked into the Sheriff's Office at approximately 8:15 P.M. and had in his possession a .22 caliber pistol containing three live shells and three spent cartridge cases. This pistol was proved to have been purchased by the appellant from Phillips Pawn Shop in the City of Beaumont between 4:00 P.M. and 5:30 P.M. on January 7, 1964.

The cause of the deceased's death was established by medical testimony showing that she had died as a result of gunshot wounds to the brain.

The State proved that the defendant had been previously convicted of the offense of murder with malice as alleged in the indictment.

We find the evidence sufficient to sustain the verdict.

Appellant offered to stipulate, prior to the trial, that he had been previously convicted of murder as alleged in the second count of the indictment. Upon making this offer appellant moved the trial court to instruct the state not to read the portion of the indictment which referred to the prior conviction and not to offer any proof of said prior conviction, which motion was denied.

Appellant also objected to the reading of the indictment, and after the reading of the indictment alleging the prior conviction, he moved for a mistrial and also objected to any and all testimony in regard to the first conviction.

Appellant bottoms the foregoing contentions upon the theory that the trial court denied him due process of law by sanctioning this procedure on the part of the state before the determination of his guilt on the primary offense. He contends that there was no fact issue for the determination of the jury as to his identity or the validity of the prior conviction.

Appellant also contends that Art. 64, V.A.P.C., is unconstitutional for the reason that it places the accused in double jeopardy in that this statutory provision uses the fact of the preceding offense to establish an element of the primary offense.

We shall dispose of these three related contentions together, as the parties have done in their briefs. We have consistently held that the procedure of reading an indictment to a jury showing that the person on trial has been previously convicted is not a violation of due process of law. We held in *Wright v. State,* 364 S.W. 2d 384, a case in which the appellant there offered to judicially confess and stipulate as to his former conviction instead of the state offering proof of the prior conviction, that the state could not be prevented from making proof of the prior alleged conviction. Wright's conviction was under Art. 64, V.A. P.C.

In *Pitcock v. State,* 367 S.W. 2d 864, this Court, speaking through this scrivener, did announce a new

rule *in those cases where "the jury has no choice in imposing punishment* if it finds the appellant guilty and that he has been previously convicted." We said: "Thus, if accused stipulates the prior conviction, that issue is resolved and the question of guilt is all that remains." We are convinced of the soundness of this rule, but *it is not applicable to cases coming under Art. 64, supra.* The jury does have a choice in imposing punishment under Art. 64, as may be seen from the foregoing terms of this article.

Since appellant's contentions have been before this Court numerous times, we shall not enter into a detailed discussion. His contentions have been adversely decided by this Court in the rather recent case of *Crocker v. State,* 385 S.W. 2d 392, and the very recent case of *Wigginton v. State,* No. 37,645, and cases there cited.

We adhere to these prior holdings and overrule appellant's contentions.

We have examined with great care appellant's remaining contentions, but we find no error reflected by them. It would contribute nothing to the jurisprudence of this state by discussing them here.

Finding no reversible error, the judgment is affirmed.

McDonald, Presiding Judge

(Delivered March 17, 1965.)

APPENDIX "B"

Art. 37.07 [693] [770] [750] Verdict must be general; separate hearing on proper punishment

1. The verdict in every criminal action must be general. When there are special pleas on which a jury is to find, it must say in its verdict that the allegations in such pleas are true or untrue. If the plea is not guilty, it must find that the defendant is either guilty or not guilty.

2. Alternate procedure.

(a) In felony cases less than capital and in capital cases where the State has made it known that it will not seek the death penalty, and where the plea is not guilty, the judge shall, before the argument begins, first submit to the jury the issue as to the guilt or innocence of the defendant of the offense or offenses charged, without authorizing the jury to pass upon the punishment to be imposed; provided, however, that in the charge which submits the issue of guilt or innocence there shall be included instructions showing the jury the punishment provided by law for each offense submitted.

(b) If a finding of guilty is returned, it shall then be the responsibility of the judge to assess the punishment applicable to the offense charged where the same is not absolutely fixed by law to some particular penalty except when the defendant, upon the return of a finding of guilty, requests that the punishment be assessed by the same jury. In the event the defendant elects to have the jury fix the punishment in cases where the punishment is fixed by law, the court shall

instruct the jury that if they find the defendant is the same person who was convicted in the prior conviction or convictions alleged for enhancement, they should set his punishment as prescribed by law.

Regardless of whether the punishment be assessed by the judge or the jury, evidence may be offered by the State and the defendant as to the prior criminal record of the defendant, his general reputation and his character.

(c) After the introduction of such evidence has been concluded, and if the jury has been selected to assess the punishment, the court shall give such additional written instructions as may be necessary and the order of procedure and the rules governing the conduct of the trial shall be the same as are applicable on the issue of guilt or innocence.

(d) In cases where the matter of punishment is referred to the jury, the verdict shall not be complete until the jury has rendered a verdict both on the guilt or innocence of the defendant and the amount of punishment, where the jury finds the defendant guilty. In the event the jury shall fail to agree, a mistrial shall be declared, the jury shall be discharged, and no jeopardy shall attach.

(e) When the judge assesses the punishment, and after the hearing of the evidence hereinabove provided for, he shall forthwith announce his decision in open court as to the punishment to be assessed.

(f) Nothing herein shall be construed as affecting the admissibility of extraneous offenses on the question of guilt or innocence.

APPENDIX "C"

Article 64, Vernon's Annotated Penal Code of the State of Texas:

"Second Conviction for capital offense.

"A person convicted a second time of any offense to which the penalty of death is affixed as an alternate punishment shall not receive on such second conviction a less punishment than imprisonment for life in the penitentiary."

APPENDIX "D"

Article 1257a, Vernon's Annotated Penal Code of the State of Texas:

"Evidence

"In all prosecutions for felonious homicide the State or the defendant shall be permitted to offer testimony as to all relevant facts and circumstances surrounding the killing and the previous relationship existing between the accused and the deceased, together with all relevant facts and circumstances going to show the condition of the mind of the accused at the time of the homicide, which may be considered by the jury in determining the punishment to be assessed. Provided, however, that in all convictions under this Act and where the punishment assessed by the jury does not exceed five years, the defendant shall have the benefits of the suspended sentence act."

APPENDIX "E"

Article 21.24, Code of Criminal Procedure 1965:

"May contain several counts but only one offense

"An indictment, information or complaint may contain as many counts charging the same offense as the attorney who prepares it, acting in good faith, may think necessary to insert, but may not charge more than one offense. An indictment or information shall be sufficient if any one of its counts be sufficient."